No. 20-6409

IN THE SUPREME COURT OF THE UNITED STATES

HUGO HUMBERTO PEREZ RANGEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that an asserted error in the calculation of petitioner's advisory sentencing guidelines range was harmless, where the district court was aware of the alternative guidelines range advocated by petitioner, expressly stated that it would have imposed the same sentence regardless of the correct guidelines range, and explained that the sentence was appropriate in light of the circumstances of the case and the 18 U.S.C. 3553(a) sentencing factors.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

United States v. Perez Rangel, No. 18-cr-349 (Apr. 16, 2019)

United States Court of Appeals (5th Cir.):

United States v. Perez Rangel, No. 19-10439 (June 22, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is not published in the Federal Reporter but is reprinted at 810 Fed. Appx. 319.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2020. The petition for a writ of certiorari was filed on November 18, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of illegally reentering the United States after having been removed, in violation of 8 U.S.C. 1326(a) and (b)(1). Pet. App. B1. The district court sentenced him to 54 months of imprisonment, to be followed by two years of supervised release. Id. at B2-B3. The court of appeals affirmed. Id. at A1-A3.

1. Petitioner is a native and citizen of Mexico. Presentence Investigation Report (PSR) ¶ 9. On an unknown date, he entered the United States illegally, without inspection by an immigration officer. Ibid. In 2005, petitioner was found in the United States and granted a voluntary return to Mexico. PSR ¶ 10.

In 2009, petitioner was again found in the United States. PSR ¶ 11. He was convicted of evading arrest or detention with a vehicle, in violation of Texas law, and sentenced to 90 days of imprisonment. Ibid. The following year, he was arrested for driving while intoxicated, in violation of Texas law, and again granted a voluntary return to Mexico. PSR ¶ 12.

In 2011, petitioner was again found in the United States. PSR ¶ 13. He was convicted of illegally entering the United States, in violation of 8 U.S.C. 1325, and sentenced to 180 days of imprisonment. PSR ¶¶ 13, 40; 11-mj-3696 D. Ct. Doc. 1, at 2 (W.D. Tex. Apr. 25, 2011). He was also ordered removed to Mexico by an immigration judge. PSR ¶ 13.

In 2013, petitioner was again found in the United States. PSR ¶ 14. He was convicted of driving while intoxicated, in violation of Texas law, and sentenced to 120 days of imprisonment. Ibid. He was ordered removed to Mexico for a second time. Ibid.

In 2016, petitioner was again found in the United States. PSR ¶ 15. He was convicted of driving while intoxicated, in violation of Texas law, and sentenced to ten years of imprisonment, suspended for five years of probation. Ibid. He was then ordered removed to Mexico for a third time. Ibid.

In 2017, petitioner was again found in the United States and arrested on an outstanding warrant. PSR ¶ 16. The trial court revoked his probation on his 2016 conviction for driving while intoxicated, and imposed two years of imprisonment. PSR ¶ 17.

2. A federal grand jury in the Northern District of Texas indicted petitioner on one count of illegally reentering the United States after having been removed, in violation of 8 U.S.C. 1326(a) and (b)(1). Indictment 1. Petitioner pleaded guilty. Pet. App. B1.

The Probation Office's presentence report assigned petitioner a total offense level of 13 and a criminal history category of VI, corresponding to an advisory guidelines range of 33 to 41 months of imprisonment. PSR ¶¶ 34, 45, 71. In calculating petitioner's advisory guidelines range, the Probation Office applied the version of the Sentencing Guidelines in effect at the time of his offense -- namely, the 2016 Guidelines -- rather than the version

of the Guidelines in effect at the time of his sentencing -- namely, the 2018 Guidelines. PSR ¶ 23. The Probation Office did so on the view that applying the 2018 Guidelines would result in a higher advisory guidelines range than applying the 2016 Guidelines and thus "violate the ex post facto clause of the U.S. Constitution." Ibid.; see C.A. ROA 160; Peugh v. United States, 569 U.S. 530, 533 (2013).

As relevant here, Sentencing Guidelines § 2L1.2(b) of the 2018 Guidelines provides:

> (3) (Apply the Greatest) If, after the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct that, at any time, resulted in --
>
> * * *
>
> (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by 8 levels.

Sentencing Guidelines § 2L1.2(b) (2018). The Probation Office observed that, after petitioner was first ordered removed in 2011, he engaged in criminal conduct resulting in a felony conviction for driving while intoxicated in 2016. PSR ¶ 26; see PSR ¶ 42. Following petitioner's third order of removal, that conviction resulted in a sentence of two years of imprisonment upon revocation of petitioner's probation in 2017. PSR ¶ 17. The Probation Office therefore determined that, under the 2018 Guidelines, an eight-level enhancement would be warranted under Section 2L1.2(b)(3)(B),

yielding an advisory guidelines range of 51 to 63 months. C.A. ROA 160.

In contrast, Sentencing Guidelines § 2L1.2(b) of the 2016 Guidelines provides:

> (3) (Apply the Greatest) If, at any time after the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct resulting in --
>
> * * *
>
> (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by 8 levels; [or]
>
> (D) a conviction for any other felony offense (other than an illegal reentry offense), increase by 4 levels.

Sentencing Guidelines § 2L1.2(b) (2016). The Probation Office took the view that the 2016 version of Section 2L1.2(b)(3) allows for consideration of only pre-removal terms of imprisonment in determining the length of the sentence imposed. See C.A. ROA 159-160. The Probation Office thus determined that, because petitioner's 2016 conviction for driving while intoxicated did not result in a sentence of two years of imprisonment until after petitioner was ordered removed for a third time, that offense warranted only a four-level enhancement under the 2016 version of Section 2L1.2(b)(3). PSR ¶ 26; see C.A. ROA 159-160. To avoid what it believed would be "an ex post facto violation," the Probation Office applied the 2016 Guidelines, rather than the 2018 Guidelines, in calculating petitioner's advisory guidelines range

to be 33 to 41 months of imprisonment. C.A. ROA 160 (citation omitted).

The government objected, arguing that petitioner's 2016 conviction for driving while intoxicated warranted an eight-level enhancement under either the 2016 or the 2018 version of Section 2L1.2(b)(3). C.A. ROA 151-155. The government contended that the fact that the imposition of petitioner's two-year term of imprisonment for that offense occurred after his third order of removal was immaterial under the 2016, as well as the 2018, Guidelines Manual. Id. at 153.

3. At the sentencing hearing, the district court sustained the government's objection. Sent. Tr. 5-10, 16-17. The court determined that, "[e]ven if the 2016 guidelines are applied," petitioner "is subject to an 8-level enhancement under Section 2L1.2(b)(3)" because petitioner's 2016 conviction and revocation of his probation "all occurred long after [petitioner] was ordered removed the first time in 2011." Id. at 9. And the court explained that, under Section 2L1.2(b)(3), the fact that petitioner "was removed again * * * after his felony conviction, but before his revocation[,] does not change the analysis." Id. at 9-10. The court then assigned petitioner a total offense level of 17 and a criminal history category of VI, corresponding to an advisory guidelines range of 51 to 63 months of imprisonment. Id. at 20.

After hearing argument from both petitioner and the government on the 18 U.S.C. 3553(a) sentencing factors, see Sent.

Tr. 20-41, the district court imposed a sentence of 54 months of imprisonment, id. at 42. The court explained that it would have "normally impose[d] a sentence in the mid guidelines range of 56 months," but that its 54-month sentence accounted for two months that petitioner had spent in administrative custody. Ibid. The court also emphasized that petitioner had illegally entered the country at least "six times." Id. at 46; see id. at 35 (observing that petitioner "returns not too long after he is removed"). The court explained that, while "[i]t is one thing for a person to enter into this country illegally once or twice or even three times perhaps," "there is really no logical excuse for six times." Id. at 45-46; see id. at 38 (stating that "3.2 times" is the "average" number of times "that a person enters this country illegally"). The court also emphasized "the seriousness of [petitioner's] other criminal history," id. at 36, observing that "driving while intoxicated is a serious offense, and people get killed from other people who are driving while intoxicated," id. at 38; see id. at 35 (describing petitioner's criminal history as "pretty serious"). The court therefore determined that a 54-month sentence was "no greater than necessary to accomplish the purposes set out in" Section 3553(a)(2), id. at 42, and it stated that it would "impose this sentence whether it ruled in favor of the defense as to the 4-level versus 8-level enhancement or ruled against the defense," id. at 46.

4. The court of appeals affirmed in an unpublished, nonprecedential opinion. Pet. App. A1-A3. On appeal, petitioner contended that the district court erred in applying an eight-level enhancement rather than a four-level enhancement under Section 2L1.2(b)(3). Id. at A1. The court of appeals found it unnecessary to address that contention because it determined that any error was "harmless 'beyond a reasonable doubt.'" Id. at A2 (quoting Chapman v. California, 386 U.S. 18, 24 (1967)); see id. at A2-A3.[1]

The court of appeals explained that an error in calculating the guidelines range can be harmless if the government "show[s] that the district court considered both Guidelines ranges * * * and explained that it would give the same sentence either way." Pet. App. A2 (citation omitted). And the court of appeals found that the government had made the requisite harmlessness showing in this case. Id. at A3. The court observed that the district court had "[c]onsider[ed] the issue 'in detail'" and had "discussed the presentence investigation report's recommendations of a four-level enhancement (because of the ex post facto concern) and range of 33-41 months' imprisonment before concluding the eight-level enhancement applied, yielding a guidelines range of 51-63 months'

[1] To the extent that petitioner may be suggesting (Pet. ii) that his view that the correct guidelines range was 33 to 41 months was "vindicated on appeal," any such suggestion is incorrect. The court of appeals declined to address whether the district court erred in applying an eight-level enhancement under Section 2L1.2(b)(3). See Pet. App. A1-A3.

imprisonment." Ibid. The court of appeals also noted that, "after describing [petitioner's] extensive pattern of recidivism and illegal border crossings," the district court "unambiguously explained it would impose the same sentence of 54 months' imprisonment whether a four- or eight-level enhancement applied." Ibid. The court of appeals therefore found this case "distinguishable" from cases in which "there was 'no explicit or particularized statement from the district court showing that it calculated or considered the correct Guidelines range.'" Ibid. (citation omitted).

ARGUMENT

Petitioner contends (Pet. 12-23) that the court of appeals erred in determining that an asserted error in the calculation of his advisory guidelines range was harmless. That contention lacks merit, and the court's unpublished per curiam decision does not conflict with any decision of this Court or another court of appeals. This Court has repeatedly denied petitions for writs of certiorari that have raised similar issues. See Thomas v. United States, No. 20-5090 (Jan. 11, 2021); Torres v. United States, 140 S. Ct. 1133 (2020) (No. 19-6086); Elijah v. United States, 139 S. Ct. 785 (2019) (No. 18-16); Monroy v. United States, 138 S. Ct. 1986 (2018) (No. 17-7024); Shrader v. United States, 568 U.S. 1049 (2012) (No. 12-5614); Savillon-Matute v. United States, 565 U.S. 964 (2011) (No. 11-5393); Effron v. United States, 565 U.S. 835 (2011) (No. 10-10397); Rea-Herrera v. United States,

557 U.S. 938 (2009) (No. 08-9181); Mendez-Garcia v. United States, 556 U.S. 1131 (2009) (No. 08-7726); Bonilla v. United States, 555 U.S. 1105 (2009) (No. 08-6668).[2] The same result is warranted here.

1. The court of appeals correctly applied the principles of harmless-error review in determining that any error in the district court's calculation of petitioner's advisory guidelines range was harmless. Pet. App. A2-A3.

a. In Gall v. United States, 552 U.S. 38 (2007), this Court stated that under the advisory Sentencing Guidelines, an appellate court reviewing a sentence, within or outside the guidelines range, must make sure that the sentencing court made no significant procedural error, such as by failing to calculate or incorrectly calculating the guidelines range, treating the Guidelines as mandatory, failing to consider the sentencing factors set forth in 18 U.S.C. 3553(a), making clearly erroneous factual findings, or failing to explain the sentence. 552 U.S. at 51. The courts of appeals have consistently recognized that errors of the sort described in Gall do not automatically require a remand for resentencing, and that ordinary appellate principles of harmless-error review apply. As the Seventh Circuit has explained:

> [a] finding of harmless error is only appropriate when the government has proved that the district court's sentencing

[2] Other pending petitions for writs of certiorari raise similar issues. See Brown v. United States, No. 20-6374 (filed Oct. 13, 2020); Snell v. United States, No. 20-6336 (filed Nov. 10, 2020).

> error did not affect the defendant's substantial rights (here -- liberty). To prove harmless error, the government must be able to show that the Guidelines error "did not affect the district court's selection of the sentence imposed." [United States v. Anderson, 517 F.3d 953, 965 (7th Cir. 2008)] (quoting Williams v. United States, 503 U.S. 193, 203 (1992) (applying harmless error pre-Gall)).

United States v. Abbas, 560 F.3d 660, 667 (2009); see Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.").

A sentencing court may confront a dispute over the application of the Sentencing Guidelines. When the court resolves that issue and imposes a sentence, it may also explain that, had it resolved the disputed issue differently and arrived at a different advisory guidelines range, it would nonetheless have imposed the same sentence in light of the factors enumerated in 18 U.S.C. 3553(a). Under proper circumstances, that permits the reviewing court to affirm the sentence under harmless-error principles even if it disagrees with the sentencing court's resolution of the disputed guidelines issue. This Court in Molina-Martinez v. United States, 136 S. Ct. 1338 (2016), analogously recognized that when the "record" in a case shows that "the district court thought the sentence it chose was appropriate irrespective of the Guidelines range," the reviewing court may determine that "a reasonable probability of prejudice does not exist" for purposes of plain-error review, "despite application of an erroneous Guidelines range." Id. at 1346; see id. at 1348 (indicating that a "full remand" for resentencing may be unnecessary when a reviewing court

is able to determine that the sentencing court would have imposed the same sentence "absent the error"). Although Molina-Martinez concerned the requirements of plain-error review under Federal Rule of Criminal Procedure 52(b), the principle it recognized applies with equal force in the context of harmless-error review under Rule 52(a).

b. Applying principles of harmless-error review to the circumstances of this case, the court of appeals correctly determined that any error in calculating petitioner's advisory guidelines range was harmless, because it did not affect the district court's determination of the appropriate sentence. Pet. App. A2-A3. The district court "unambiguously explained it would impose the same sentence of 54 months' imprisonment whether a four- or eight-level enhancement applied" under Section 2L1.2(b)(3). Id. at A3; see Sent. Tr. 46 ("[T]he Court will impose this sentence whether it ruled in favor of the defense as to the 4-level versus 8-level enhancement or ruled against the defense."). And to the extent that harmless-error review entails asking whether the district court was aware of the alternative sentencing range that would have applied had it not erred in calculating the guidelines range, the record here satisfied that inquiry. The Probation Office noted that the alternative sentencing range would have been "33 to 41 months" and recommended that the court apply that range, C.A. ROA 160; see PSR ¶ 71; at sentencing, petitioner argued that the court should consider the "bottom" of the guidelines range to

be "33 months," Sent. Tr. 26; and the court considered petitioner's argument, but determined that an "8-level" rather than a "4-level" enhancement under Section 2L1.2(b)(3) should apply, id. at 46, in imposing a sentence of 54 months, id. at 42. The record thus demonstrates that the court was well aware of the advisory guidelines range that petitioner had advocated when the court stated that it would have imposed the same sentence regardless of the correct guidelines range.

Petitioner asserts (Pet. 22) that the district court did "not plausibly explain" why the facts of this case "would lead it to a sentence of 54 months in particular." But as the court of appeals found, the district court "[c]onsider[ed] the issue 'in detail'" and determined that a 54-month sentence was appropriate in light of petitioner's "extensive pattern of recidivism and illegal border crossings." Pet. App. A3. In particular, the district court explained that, while "[i]t is one thing for a person to enter into this country illegally once or twice or even three times perhaps," "there is really no logical excuse for six times." Sent. Tr. 45-46. The court also explained that it viewed petitioner's criminal history to be "pretty serious," id. at 35, emphasizing that "people get killed from other people who are driving while intoxicated," id. at 38. Thus, to the extent that the adequacy of the district court's explanation of its chosen sentence is part of

the harmless-error inquiry, the explanation here supports the court of appeals' harmless-error determination.[3]

c. Petitioner contends (Pet. 17-19) that permitting harmless-error review of guidelines-calculation errors "diminish[es] the anchoring force of the Guidelines in federal sentencing" and jeopardizes "appellate review of Guideline questions." But harmless-error review does not alter the principle that "the Guidelines should be the starting point" for a district court's determination of the appropriate sentence. Gall, 552 U.S. at 49. "It merely removes the pointless step of returning to the district court when [the court of appeals is] convinced that the sentence the judge imposes will be identical" regardless of the correct guidelines range. Abbas, 560 F.3d at 667. And far from undermining appellate review, "[a]n explicit statement that the district court would have imposed the same sentence under two different ranges can help to improve the clarity of the record,

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[3] In determining that the asserted error in this case was "harmless 'beyond a reasonable doubt,'" the court of appeals applied the harmless-error standard for constitutional errors. Pet. App. A2 (quoting Chapman v. California, 386 U.S. 18, 24 (1967)). Although the government did not specifically address the issue below, see Gov't C.A. Br. 6, application of that standard was unwarranted. The parties did not dispute that the Ex Post Facto Clause required the district court to apply the 2016 Guidelines if those Guidelines yielded a lower advisory sentencing range than the 2018 Guidelines. Rather, the parties disputed only the calculation of petitioner's offense level under the 2016 Guidelines, see C.A. ROA 151-154; Sent. Tr. 9, and any error in that calculation was not of constitutional significance. In any event, even if the harmless-error standard for constitutional errors applied, the court of appeals correctly determined that it was satisfied here. Pet. App. A2-A3.

promote efficient sentencing, and obviate questionable appeals." United States v. Zabielski, 711 F.3d 381, 389 (3d Cir. 2013).

Petitioner also contends (Pet. 19-20) that the availability of harmless-error review may cause defendants to refrain from raising guidelines-calculation errors at sentencing, so as to avoid the pronouncement of an "alternative sentence." But an objection in district court would be necessary to preserve the asserted error for appellate review. See Fed. R. Crim. P. 52(b). And defendants would have little to gain from failing to preserve their objections at sentencing. Petitioner does not dispute that, even when a defendant raises a guidelines-calculation error for the first time on appeal and the court of appeals finds the plain-error standard to be met, the district court may still impose the same sentence on remand, after considering the Section 3553(a) factors.

Petitioner likewise errs in contending (Pet. 20) that a district court's statement that it would impose the same sentence regardless of the correct guidelines range "raises serious concerns about advisory opinions." Such a statement merely represents a determination that the Section 3553(a) factors and the circumstances of the case would warrant the same sentence, independent of what may be a close question of whether a particular guidelines enhancement formally applies. And contrary to petitioner's suggestion (Pet. 21), nothing precludes defendants from contemporaneously objecting to such a determination and

advocating for a specific sentence based on the guidelines range that they believe should apply.

2. The court of appeals' decision does not conflict with any decision of another court of appeals. To the extent that some formal differences exist in the articulated requirements for harmless-error review when a district court has offered an alternative sentencing determination, those differences in approach do not reflect any meaningful substantive disagreement about when an alternative sentence can render a guidelines-calculation error harmless. And petitioner has failed to identify any court of appeals that would have reached a different result in the circumstances of this case.

Petitioner errs in contending (Pet. 16) that the court of appeals' decision conflicts with the Second Circuit's decision in United States v. Feldman, 647 F.3d 450 (2011). In Feldman, the Second Circuit declined to find a guidelines-calculation error harmless where the defendant challenged the district court's application of four separate enhancements at sentencing, and the district court did not clearly state that it would have imposed the same sentence "even absent all four of the challenged enhancements." Id. at 459; see ibid. (observing that the "district court referred, without specificity, to 'some' of the enhancements, without stating which enhancement -- or which combinations of enhancements -- would not affect [the defendant's] sentence"). The Second Circuit contrasted that scenario with a

case like this one, which "dealt with a single enhancement, * * * imposed with the explicit and unambiguous declaration that the enhancement did not affect the ultimate sentence." Ibid.; see Sent. Tr. 46; Pet. App. A3. Here, unlike in Feldman, the record is "unambiguous" that the district court would have imposed the same sentence absent the challenged enhancement, and the Second Circuit has found any guidelines-calculation error harmless in similar circumstances. Feldman, 647 F.3d at 459; see United States v. Jass, 569 F.3d 47, 68 (2d Cir. 2009), cert. denied, 558 U.S. 1159, and 559 U.S. 1087 (2010).

Petitioner also errs in contending (Pet. 14-15) that the court of appeals' decision conflicts with decisions of the Third Circuit. In United States v. Smalley, 517 F.3d 208 (2008), the Third Circuit declined to find a guidelines-calculation error harmless where the district court "did not explicitly set forth an alternative Guidelines range," id. at 214, and where its "alternative sentence" was accompanied by only a "bare statement" that was "at best an afterthought, rather than an amplification of the Court's sentencing rationale," id. at 215; see Zabielski, 711 F.3d at 389 (stating that even when a district court makes an "explicit statement that [it] would have imposed the same sentence under two different ranges," it "still must explain its reasons for imposing the sentence under either Guidelines range"). The Third Circuit, however, has never relied on Smalley or United States v. Zabielski, supra, to require resentencing where, as here, the record

demonstrates that the district court was well aware of the alternative sentencing range, see pp. 12-13, supra; the court expressly stated that it would have "impose[d]" the same sentence regardless of "whether it ruled in favor of the defense as to the 4-level versus 8-level enhancement or ruled against the defense," Sent. Tr. 46; and the court explained that its sentence was appropriate in light of petitioner's "extensive pattern of recidivism and illegal border crossings," Pet. App. A3.

Petitioner is likewise mistaken (Pet. 15) in asserting a conflict between the decision below and the Tenth Circuit's decision in United States v. Peña-Hermosillo, 522 F.3d 1108 (2008). In Peña-Hermosillo, the Tenth Circuit did not address "when, if ever, an alternative holding based on the exercise of Booker discretion could render a procedurally unreasonable sentence calculation harmless." Id. at 1117-1118. Instead, the Tenth Circuit resolved the case on a different ground -- that the district court's "alternative" sentence itself did "not satisfy the requirement of procedural reasonableness" because the court "offer[ed] no more than a perfunctory explanation" for it. Id. at 1118. Here, in contrast, the district court "looked at this case in detail," Sent. Tr. 45, and explained why it viewed a sentence of 54 months to be "imminently fair," id. at 46, and "no greater than necessary to accomplish the purposes set out in" Section 3553(a)(2), id. at 42. Thus, unlike in Peña-Hermosillo, the district court adequately explained its chosen sentence. See

pp. 13-14, supra. No basis exists to conclude that the Tenth Circuit would have found reversible error in the particular circumstances of this case.

Nor does petitioner identify a sound reason to conclude that the Ninth Circuit would have found reversible error in the particular circumstances here. In both United States v. Garcia-Jimenez, 807 F.3d 1079 (2015), and United States v. Acosta-Chavez, 727 F.3d 903 (2013), the Ninth Circuit declined to find application of a 16-level enhancement harmless where the district court's sentence represented a substantial upward variance from the correct guidelines range. See Garcia-Jimenez, 807 F.3d at 1089; Acosta-Chavez, 727 F.3d at 909-910. In each case, the Ninth Circuit's decision rested on the view that the district court had not adequately explained the extent of that variance. See ibid. In this case, by contrast, the district court's 54-month sentence represented only a 13-month upward variance from the alternative guidelines range advocated by petitioner, see p. 12, supra, and the court explained that such a sentence was warranted in light of petitioner's "extensive pattern of recidivism and illegal border crossings," Pet. App. A3. Thus, unlike in Garcia-Jimenez and Acosta-Chavez, the district court's explanation of its sentence was adequate. See pp. 13-14, supra.

Petitioner's reliance (Pet. 16-17) on United States v. Abbas, supra, and United States v. Ortiz, 636 F.3d 389 (8th Cir. 2011), is also misplaced. In Abbas, the Seventh Circuit, in accord with

the decision below in this case, found a guidelines-calculation error harmless where the district court's statement that it "would have imposed the same sentence" regardless of the correct guidelines range "was not just a conclusory comment tossed in for good measure." 560 F.3d at 667. Likewise here, the district court's statement that it would have "impose[d]" the same sentence regardless of "whether it ruled in favor of the defense as to the 4-level versus 8-level enhancement or ruled against the defense," Sent. Tr. 46, was not just a conclusory comment, but rather was accompanied by an explanation, see Pet. App. A3. And in Ortiz, the Eighth Circuit similarly found a guidelines-calculation error harmless in circumstances like those here, where the district court was well aware of the alternative guidelines range and made clear that it would have imposed the same sentence regardless of which range was correct. 636 F.3d at 392-395; see United States v. Sanchez-Martinez, 633 F.3d 658, 659-660 (8th Cir. 2011) (similar); United States v. Jackson, 594 F.3d 1027, 1030 (8th Cir. 2010) (similar). Petitioner thus errs in asserting any conflict between the decision below and the decision of another court of appeals.

3. In any event, this case would be an unsuitable vehicle for resolving the question presented, because the district court did not err in applying an eight-level enhancement under Sentencing Guidelines § 2L1.2(b)(3) (2016) in the first place. The 2016 version of Section 2L1.2(b)(3) provides for an eight-level enhancement "[i]f, at any time after the defendant was ordered

deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct resulting in * * * a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more." Sentencing Guidelines § 2L1.2(b)(3)(B) (2016). Here, after petitioner was ordered removed from the United States in 2011, PSR ¶ 13, he engaged in criminal conduct resulting in a conviction for a felony offense -- namely, driving while intoxicated, PSR ¶ 15 -- for which the sentence imposed was two years of imprisonment upon revocation of his probation, PSR ¶ 17. Under the text of the provision, the fact that he was removed again from the United States before the two-year sentence was imposed, PSR ¶ 15, is immaterial. Although Section 2L1.2(b)(3) was later amended to clarify that an eight-level enhancement is warranted so long as the defendant's criminal conduct following his first removal resulted "at any time" in a felony conviction for which a sentence of two years or more was imposed, Sentencing Guidelines § 2L1.2(b)(3)(B) (2018), the text of the 2016 version did not suggest otherwise. Thus, the district court correctly determined that, "[e]ven if the 2016 guidelines are applied," petitioner "is subject to an 8-level enhancement under Section 2L1.2(b)(3)." Sent. Tr. 9. Because no guidelines-calculation error in fact occurred, any decision in petitioner's favor on the harmless-error question presented would not affect the outcome.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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